Supreme Court, U.S.
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No. 00-742 NOV 6 - 2000

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In The
Supreme Court of the United States

D'ELEGANCE MANAGEMENT LIMITED, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA, for the use and benefit of S & D Land Clearing; MIKE MITCHELL, d/b/a Malaco,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether, in the context of a suit brought in the name of the United States, pursuant to the Miller Act, 40 U.S.C. §§270a et seq., a plaintiff should be allowed to recover as damages for fraud the expenses incurred as a result of entering into a contract, as well as damages for breach of the same contract.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were D'Elegance Management Ltd., Inc., as Defendant-Appellant-Cross-Appellee and the United States of America, for the use and benefit of S & D Land Clearing and Mike Mitchell, d/b/a Malaco as Plaintiffs-Appellees-Cross-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioners declare that they have no parent companies or any wholly owned subsidiaries.

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The Fourth Circuit's opinion (App. at 1) is unpublished and may be found at 217 F.3d 843 (Table), 2000 W.L. 966034 (4th Cir. July 13, 2000), and the district court opinion (App. At 25) is unreported.

JURISDICTION

The Court of Appeals' judgment was entered on July 13, 2000, and its order denying D'Elegance's timely Petition for Rehearing was entered on August 8, 2000. (App. at 53). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Chapter 75 of the North Carolina General Statutes, and in particular, § 75-16. Chapter 75 of the North Carolina General Statutes provides in pertinent part:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have the right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

STATEMENT OF THE CASE

This action was initiated by the United States of America for the Use and Benefit of S&D Land Clearing and Mike Mitchell (collectively "Mitchell")[1] against D'Elegance Management Limited, Inc. ("D'Elegance") in the United States District Court for the Eastern District of North Carolina (the "District Court") seeking to recover claims for breach of contract, fraud, and violations of the North Carolina Unfair and Deceptive Trade Practices Act. (App. at 5) Subject matter jurisdiction in the District Court was predicated upon 28 U.S.C. § 1331 in that Mitchell sought to recover for claims under 40 U.S.C. §§ 270(a) and (b) (Miller Act). (App. at 8 n.5.) Mitchell also sought recovery for state law claims pursuant to the District Court's supplemental jurisdiction under 28 U.S.C. § 1367. (App. at 7-8.) Jurisdiction of the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals") was invoked under 28 U.S.C. § 1291, as the appeal was timely taken from two final Orders of the District Court.

The dispute centers around the debris clean-up that followed devastation caused to Eastern North Carolina by Hurricane Fran in September, 1996. (App. at 5.) D'Elegance was a subcontractor to Environmental Corrections Corp., a/k/a Waste Control Services ("Waste Control"). (Id.) Waste Control was the prime contractor with the United States Army Corps of Engineers (the "Corps of Engineers") for the removal of construction and demolition debris ("C&D debris") and other clean-up operations in eight North Carolina counties, including New Hanover and adjacent Pender Counties. (Id.) Waste Control subsequently

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[1] The Fourth Circuit referred in its opinion to the action as having been prosecuted by Mitchell for ease of reference. D'Elegance will do the same in this Petition except where specifically referring to S&D Land Clearing.

subcontracted with D'Elegance for the removal of C&D debris in New Hanover and Pender Counties. (Id.)

D'Elegance, in turn, subcontracted with Mitchell for the removal of debris in New Hanover County. (Id.) Mitchell agreed to perform debris removal work in New Hanover County at a price of $6.75 per cubic yard. (Id.) Subsequently, Mitchell subcontracted with other debris loading and hauling companies to assist in removing debris. (App. at 6.) Mitchell began removing debris on October 4, 1996. (Id.) By October 9, however, several of Mitchell's subcontractors left the job for failure of Mitchell to make timely payments. (App. at 7) Mitchell continued to load and haul C&D debris until October 29, 1996 despite the loss of its subcontractors. (Id.)

Mitchell contended it had the exclusive right to load and haul all C&D debris in New Hanover County. (App. at 5.) D'Elegance had multiple subcontractors assisting it with C&D debris removal in New Hanover County. (App. at 6-7.) As a result, Mitchell was not allowed to remove all C&D debris in New Hanover County as it contended its contract with D'Elegance provided. (App. at 6) On that basis, it brought a claim for breach of contract against D'Elegance for allegedly preventing it from loading and hauling C&D debris. (App. at 7-8.)

Mitchell also asserted claims for fraud and violations of the North Carolina Unfair and Deceptive Trade Practices Act against D'Elegance. (Id.) Mitchell's fraud claim was based on Mitchell's allegation that D'Elegance fraudulently induced it to enter into the subcontract with D'Elegance on the promise that in addition to C&D debris, Mitchell would be allowed to load and haul all vegetative debris in New Hanover County. (Id.) D'Elegance counterclaimed against Mitchell for breach of contract, asserting Mitchell had failed to meet its quota and failed to pay its subcontractors in a timely fashion. (App. at 8.)

The jury found that both D'Elegance and Mitchell had breached the contract. (App. at 9.) The jury further

found that D'Elegance committed fraud by inducing Mitchell to enter into the contract with the belief it would be entitled to load and haul vegetative debris. (Id.) The jury also found D'Elegance had committed all conduct alleged to violate the North Carolina Unfair and Deceptive Trade Practices Act, and the District Court found that conduct constituted a violation of the North Carolina Unfair and Deceptive Trade Praetices Act. (App. at 9-10.)

The evidence presented at trial related to Mitchell's compensatory damages consisted of two components: evidence of damages allegedly suffered by Mitchell in the form of lost profits related to C&D debris, and evidence of damages related to vegetative debris. (App. at 8-9.) In its attempt to prove lost profits, Mitchell needed to offer evidence of the total amount of C&D or vegetative debris loaded and hauled in New Hanover County and the rate to which it was allegedly entitled to be paid in order to arrive at a gross profit figure. (App. at 9 n.6, App. at 27-28) Mitchell then was required to present evidence of the costs it would have incurred in loading and hauling the debris, and deduct that amount from its gross profit figure to arrive at its total damages. (Id.)

For its breach of contract damages, Mitchell contended it was entitled to lost profits it would have earned from the contract had it been permitted to load and haul all of the C&D debris in New Hanover County. (App. at 8-9.) The subcontract between Mitchell and D'Elegance provided that Mitchell would be paid $6.75 for each cubic yard of C&D debris that it loaded and hauled. (App. at 9 n.6.) The District Court found that there was "no dispute that the quantity of C&D debris for removal in New Hanover County was 166,559 cubic yards." (App. at 30.) Mitchell's evidence as to costs for C&D debris came from its expert witness, Robert Coleman. (App. at 14 n.11.) Mr. Coleman testified that costs for C&D removal in New Hanover County would have been $4.10 per cubic yard. (Id.) Coleman's estimate was based partially on $188,827.00 in

costs actually incurred by Mitchell for work Mitchell actually completed in performing under the contract. (App. at 9 n.6.)

With regard to Mitchell's fraud damages, Mitchell claimed it was entitled to profits it claimed it lost by not being allowed to load and haul all vegetative debris in New Hanover County at the price of $6.75 per cubic yard price. (App. at 27-28.) Mitchell presented evidence if the cost it would have incurred to load and haul vegetative debris, and based its claim on the profit it contended it would have earned for each cubic yard of vegetative debris removed in New Hanover County. (Id.) Mitchell presented no competent evidence, however, related to the actual quantity of vegetative debris loaded and hauled in New Hanover County. (Id.) The only evidence it offered on that count was hearsay testimony of Mr. Coleman. (Id.)

Following trial, the jury awarded Mitchell $400,000.00 in compensatory damages for breach of contract, $100,000.00 for fraud as compensatory damages, plus $500,000.00 in punitive damages.[2] (App. at 9-10.) D'Elegance, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, renewed its Motion for Judgment as a Matter of Law, and in the alternative, pursuant to Rule 59 of the Federal Rules of Civil Procedure, moved for a new trial and/or to alter or amend the Judgment entered by the District Court based on the jury's verdict. (App. at 10.) On November 3, 1998, the District Court partially granted D'Elegance's Motion for Judgment as a Matter of Law and set aside Mitchell's $100,000.00 fraud damages award. (App. at 29.) The District Court granted D'Elegance's

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[2] Following the jury's verdict, Mitchell elected to forego its punitive damages award and instead elected to have its compensatory damages trebled pursuant to N.C. Gen.Stat. § 75-16. (App. at 10.) The District Court held, and the Court of Appeals agreed, that Mitchell's $400,000.00 compensatory damage award for breach of contract could not be trebled under North Carolina law. (App. at 22-23.)

Motion as to the fraud damages because it held Mitchell failed to present sufficient evidence of lost profits related to vegetative debris. (Id.) Because Mitchell had failed to provide any competent evidence of the amount of vegetative debris removed, the District Court held that Mitchell had failed to provide sufficient evidence of damages with the requisite degree of certainty required by North Carolina law to support a compensatory damages award for fraud. (Id.) The District Court also concluded that, although both parties breached their contractual obligations, D'Elegance caused Mitchell's breach by hiring away its workers, and on that basis refused to set aside the $400,000.00 breach of contract award. (App. at 10.)

On November 3, 1998, the District Court entered a Judgment against D'Elegance to that effect. (App. at 48.) On December 2, 1998, D'Elegance filed its Notice of Appeal. Mitchell noticed a cross-appeal on December 15, 1998.

In its July 13, 2000 decision, the Court of Appeals affirmed the denial of D'Elegance's Motion for Judgment as a matter of law on Mitchell's breach of contract claim, the denial of Mitchell's request to treble the $400,000.00 damage award, and award of attorneys' fees, and the registration of the judgment. (App. at 24.) However, the Court of Appeals reversed the decision of the District Court to set aside the $100,000.00 compensatory damage award for fraud. (Id.) The Court of Appeals held that the evidence Mitchell presented as to the cost incurred in performance of the contract could support the jury's compensatory damage award for fraud, and held that Mitchell was entitled to have that award trebled as a result of his election to receive Chapter 75 remedies rather than remedies for common law fraud. (App. at 21-22.) The Court of Appeals declined to address the issue at to whether Mitchell had presented competent evidence of the amount of vegetative debris loaded and hauled in New Hanover County (App. at 21 n.17), and instead held that Mitchell could recover the cost it incurred in performing the contract as damages for its fraud

claim. (App. at 21-22.) D'Elegance filed a timely Motion to Reconsider with the Court of Appeals which was denied on August 8, 2000. (App. at 53.)

D'Elegance now respectfully requests that the Court grant a writ of certiorari to the Court of Appeals to review the Court of Appeals' reversal of the decision of the District Court to set aside the $100,000.00 compensatory damage award for fraud on the grounds that the Court of Appeals' decision conflicts with decisions of the North Carolina Supreme Court which provide that North Carolina law prohibits a plaintiff from recovering both lost profits as damages for breach of contract, and costs incurred in performing that contract as damages for fraud.

REASONS FOR GRANTING THE WRIT

I. WRITS OF CERTIORARI SHOULD BE GRANTED TO CORRECT PATENTLY INCORRECT DECISIONS OF THE COURTS OF APPEALS ON ISSUES OF STATE LAW.

While the general practice of the Court is to deny certiorari to review decisions of the courts of appeals as to issues of state law, Thomas v. American Home Products, Inc., 519 U.S. 913, 916 (1996) (Rehnquist, C.J., dissenting), this Court has granted certiorari to review lower court decisions which run directly contrary to established state law. Leavitt v. Jane L., 518 U.S. 137, 144-45 (1996); see Steele v. General Mills, Inc., 329 U.S. 433, 438 (1947); Wichita Royalty Co. v. City Nat. Bank of Wichata Falls, 306 U.S. 103, 107 (1939). As this Court stated in Leavitt, certiorari "undoubtedly" should be granted to review a court of appeals' decision on a state law issue "where the alternative is allowing blatant federal-court nullification of state law." Leavitt, 518 U.S. at 144-45.

In this case, like in Leavitt, the Court of Appeals has committed a manifest error in applying North Carolina law.

By allowing Mitchell to recover lost profits as breach of contract damages and costs incurred in performing the contract as fraud damages, the Court of Appeals has allowed Mitchell a recovery North Carolina law specifically proscribes.

As the Court recognized in Leavitt, it should not be presumed that the Court of Appeals possesses some "natural advantage" in determining issues of North Carolina law, particularly given the fact that it reversed the decision of the District Court sitting in North Carolina. Leavitt, 518 U.S. at 145. Indeed, a review of the opinion of the Court of Appeals demonstrates the court ignored a well settled principle of North Carolina law in rendering its decision.

Further, although this issue is an issue of state law, because the project at issue was an Army Corp of Engineers project governed by federal law, and the plaintiff brought suit in the name of the United States, a federal interest is impacted by the decision by the Court of Appeals. Future parties participating in federal projects will be guided by this case. A patent misapplication of state law should not be allowed to stand to create uncertainty to the contractual rights of future parties to federal projects.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE NORTH CAROLINA SUPREME COURT.

By allowing Mitchell to recover as damages for fraud the expenses incurred as a result of entering into the contract with D'Elegance, the Court of Appeals overlooked the fact that those expenses were necessary for Mitchell's performance under the contract. That performance served as the basis for the jury's award of lost profits to Mitchell for breach of contract (App. at 9 n.6), which award was affirmed by the Court of Appeals in its July 13, 2000 decision. (App. at 13-17.) As a result, the Court of Appeals provided

Mitchell with a double redress for a single wrong, which inconsistent remedies have been explicitly prohibited by the North Carolina Supreme Court.

Under North Carolina law, it is well-settled that:

> a party who has been fraudulently induced to enter into a contract or sale has a choice of remedies. He may repudiate the contract, and, tendering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud.

Parker v. White, 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952). The doctrine of election of remedies does not prevent recourse to any remedy, but instead prevents double redress for a single wrong. Smith v. Gulf Oil Corp., 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954). Thus, "[i]t is well-established that a party alleging fraud must select either the remedy of recission or that of damages, but may not seek both, as these remedies are inconsistent." Mehovic v. Mehovic, 133 N.C. App. 131, 135, 514 S.E.2d 730, 733 (1999).

In this case, Mitchell contended that D'Elegance fraudulently induced it to enter into the contract, and sought to rescind the contract by recovering the costs it incurred in performing the contract. However, Mitchell also elected to affirm the contract and recover damages for its breach. The very expenses that the Court of Appeals found that Mitchell "would not have incurred but for D'Elegance's inducing [Mitchell] to enter into the contract" (App. at 21-22) were expenses necessary to Mitchell's performance under the contract that was an essential element of Mitchell's claim for

breach of contract, on which the jury awarded Mitchell $400,000.00 at trial. (App. at 13-17). It is inconsistent and inequitable for Mitchell to receive both the benefit of the contract and its expenses in performing under the contract. Having elected to affirm the contract, Mitchell should not be allowed to use its fraud claim to recover the expenses it incurred in performing under the contract. "[A] defrauded party is not allowed to rescind in part and affirm in part, – he must do one or the other." Parker, 235 N.C. at 688, 71 S.E.2d at 128.

Following the trial, the District Court found there was insufficient evidence of lost profits to support the jury's $100,000.00 damage award. (App. at 10.) In its July 13, 2000 decision, the Court of Appeals reversed the District Court's decision, and reinstated the jury's $100,000.00 fraud award. (App. at 21-22.) In reaching that decision, however, the Court of Appeals did not focus on whether lost profits had been proven with requisite specificity as to vegetative debris,[3] but instead on whether Mitchell had presented other evidence of fraud damages. (Id.)

Because the Court of Appeals found that Mitchell had presented other evidence of damages in Mitchell's mobilization costs, the Court of Appeals concluded the jury had sufficient evidence before it to award Mitchell $100,000.00 on its fraud claim. (Id.)

The Court of Appeals failed to consider that, by allowing Mitchell to recover the expenses it incurred as a result of entering into the contract, it was effectively providing Mitchell a windfall because Mitchell needed to incur those expenses in order to perform under the contract.

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[3] If this Court chooses to grant the writ of certiorari, D'Elegance respectfully suggests that the Court may summarily reverse the decision of the Court of Appeals, and remand for the Court of Appeals to consider the issue of whether sufficient evidence of the lost profits related to vegetative debris was presented, similar to the approach the Court employed in Leavitt. See Leavitt, 518 U.S. at 146.

Thus, if Mitchell's damages award for breach of contract is to stand, as the Court of Appeals ruled in its opinion, Mitchell should not also be able to recover under a fraud theory for the expenses incurred in performing under that contract. In addition, having premised an award of fraud damages on the untenable ground that Mitchell can recover the very mobilization costs that were essential to his performance under the contract, the Court of Appeals failed to consider the lack of competent evidence as to lost profits that was Mitchell's only alternative ground for fraud damages. Because the Court of Appeals' decision is in direct conflict with prior decisions of the North Carolina Supreme Court, cause exists to grant a writ of certiorari on the issue of whether the Court of Appeals erred by allowing Mitchell to recover expenses it incurred as a result of entering into the contract, as well as breach of contract damages for the same contract.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

November 6, 2000

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2758

UNITED STATES OF AMERICA,
for the use and benefit of S&D Land Clearing;
MIKE MITCHELL, d/b/a Malaco,

Plaintiffs-Appellees,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED,

Defendant-Appellant,

UNIVERSAL SURETY OF AMERICA,

Defendant-Appellee,

and

ENVIRONMENTAL CORRECTIONS CORPORATION,
a/k/a Waste Control Services,

Defendant.

No. 98-2852

UNITED STATES OF AMERICA,
for the use and benefit of S&D Land Clearing;
MIKE MITCHELL, d/b/a Malaco,

Plaintiffs-Appellants,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED,
Defendant-Appellee,

and

ENVIRONMENTAL CORRECTIONS CORPORATION
a/k/a Waste Control Services;
UNIVERSAL SURETY OF AMERICA,

Defendants.

No. 99-1437

UNITED STATES OF AMERICA,
for the use and benefit of S&D Land Clearing;
MIKE MITCHELL, d/b/a Malaco,

Plaintiffs-Appellees,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED,

Defendant-Appellant.

UNIVERSAL SURETY OF AMERICA,

Defendant-Appellee,

and

ENVIRONMENTAL CORRECTIONS CORPORATION, a/k/a Waste Control Services,

Defendant.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
James C. Fox, District Judge.

(CA-97-49-7-F)

Argued: May 3, 2000
Decided: July 13, 2000
Entered: July 13, 2000

Before WILKINSON, Chief Judge, and WILKINS and WILLIAMS, Circuit Judges.

Affirmed in part and reversed in part by unpublished per curiam opinion.

COUNSEL

ARGUED: Stanley Leigh Rodenbough, IV, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina, for Appellant. Augustus Graham Shirley, II, LEWIS & ROBERTS, Raleigh, North Carolina, for Appellees. **ON BRIEF:** H. Arthur Bolick, II,

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina; Charles D. Meier, MARSHALL, WILLIAMS, GORHAM & BRAWLEY, Wilmington, North Carolina; Adam C. Linkhorst, VEZINA, LAWRENCE & PISCITELLI, Ft. Lauderdale, Florida, for Appellant. Daniel K. Bryson, LEWIS & ROBERTS, Raleigh, North Carolina; Clyde H. Jarrett, III, ELLZEY & BROOKS, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

D'Elegance Management Limited, Incorporated (D'Elegance) appeals primarily an order of the district court denying its motion for judgment as a matter of law, see Fed. R. Civ. P. 50, regarding a breach of contract claim brought by Mike Mitchell and S&D Land Clearing (S&D) and denying its motion to set aside an award of attorneys' fees.[1] Mitchell cross-appeals the ruling of the district court that he failed to present sufficient evidence of damages resulting from, we will refer to the action as having been prosecuted by Mitchell. D'Elegance's fraud and accordingly was not entitled to treble damages for the fraud under North Carolina's unfair and deceptive trade practices statutes. See N.C. Gen. Stat.§ 75-1.1 (1999) ("Chapter 75"); N.C. Gen. Stat. § 75-16 (1999). We affirm in part and reverse in part.

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[1] This action was brought by the United States for the use and benefit of S&D and Mitchell, but for ease of reference, we will refer to the action as having been prosecuted by Mitchell.

I.

This action arises out of the removal of debris in eastern North Carolina following Hurricane Fran in September 1996. Waste Control Services (Waste Control) was the prime contractor with the United States Army Corps of Engineers (the Corps) by virtue of a written contract covering eight counties in North Carolina, including New Hanover County and neighboring Pender County. Waste Control subcontracted with D'Elegance for the removal of construction and demolition debris ("C&D debris")[2] from New Hanover and Pender Counties for $11.00 per cubic yard. Under the subcontract, D'Elegance agreed to remove at least 5,000 cubic yards of such debris per day.

Mitchell then entered into negotiations with D'Elegance regarding a possible subcontract. D'Elegance represented to Mitchell that it had contracted to remove not only all of the C&D debris in New Hanover County, but also all of the vegetative debris. Removing vegetative debris is quicker, and hence more profitable, work.[3] D'Elegance and Mitchell entered into a written contract pursuant to which Mitchell agreed to perform D'Elegance's debris-removal work in New Hanover County at a price of $6.75 per cubic yard. A trucking company had agreed to provide Mitchell with hauling service for $2.10 per cubic yard. And, based on Mitchell's 19 to 20 years of experience in the field of debris removal, he testified that he knew that his loading costs would be no more than $1.00, and his other costs no more than 25 cents, per cubic yard. Mitchell further testified that for C&D work only, the loading costs would have been an additional $1.00 per cubic yard; that he had anticipated that 90 to 95 percent of the debris removed would be vegetative; and that he would not have entered into the subcontract had

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[2] C&D debris consists of building and demolition materials.

[3] C&D debris must be sorted by type of material and hauled to different locations.

he known that he would not be allowed to remove the vegetative debris.

Mitchell began removing debris pursuant to the contract on October 4, 1996. Realizing that it would take approximately two weeks for his big trucks to mobilize, Mitchell initially hired smaller trucks to haul debris for $4.00 to $4.25 per cubic yard. Mitchell also hired nine crews to load the debris onto the trucks. Having arranged for his truckers, equipment, and labor, Mitchell anticipated no problems meeting D'Elegance's performance quota of 5,000 cubic yards per day. Soon after Mitchell began working, however, it became apparent that D'Elegance was continuing to remove some of the C&D debris with crews not working for Mitchell. Indeed, D'Elegance refused to allow Mitchell to remove much of the C&D debris, including some of the most profitable C&D debris.[4] D'Elegance also forced Mitchell to begin working in one small area, Wrightsville Beach, which further limited his productivity. In fact, confined to Wrightsville Beach, Mitchell was not able to use all of his crews.

On approximately the fifth day of operation, D'Elegance allowed Mitchell to move his crews out of Wrightsville Beach and begin work in the rest of the county. On that same day, however, the Corps informed Mitchell that vegetative debris removal was outside the scope of his contract. Nonetheless, Mitchell continued to remove C&D debris from the county, concerned that if he abandoned the project he would be subject to liability for breach of contract and would harm his subcontractors financially. Almost immediately after Mitchell learned that he could not remove vegetative debris, a trucking strike began, further curtailing his productivity. Mitchell was also hampered by the fact that D'Elegance was paying its truckers more than Mitchell could afford to pay and was actively attempting to hire away

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[4] For example, Mitchell was not allowed to remove C&D debris that had already been stockpiled.

Mitchell's truckers to work directly for D'Elegance. In soliciting the truckers, D'Elegance was informing them that Mitchell did not have a contract and was not going to be paid.

When it became known that Mitchell would not be allowed to load and haul vegetative debris, most of his crews quit working for him. Further, Mitchell informed the trucking company that had agreed to supply him with large trucks that he could no longer use them. Mitchell nevertheless continued to load and haul C&D debris until October 29, 1996, when Waste Control informed him that he needed to cease work on the project since he was not going to be paid by D'Elegance. Mitchell removed a total of 29,358 cubic yards of debris while on the project, far short of the amount necessary to meet D'Elegance's quota. Had he been allowed to remove all of the C&D debris remaining in the county when he entered into the contract, he would have removed an additional 166,559 cubic yards. Although D'Elegance paid $55,344 to Mitchell and $80,629.33 directly to Mitchell's subcontractors, it owed Mitchell a balance of $62,232.54 for the debris he had removed. Mitchell was left deeply indebted to his subcontractors.

On November 4, 1996, D'Elegance agreed to pay Mitchell the money due him under the contract conditioned on Mitchell's execution of a backdated contract with terms materially different from the original contract. When Mitchell refused to sign the new contract, D'Elegance refused to make further payments. Without those payments, Mitchell was more than $100,000 in debt to his subcontractors, primarily S&D, to which Mitchell had assigned a portion of his claim against D'Elegance.

Mitchell subsequently brought this action against Waste Control, D'Elegance, and Waste Control's surety. Mitchell asserted, inter alia, causes of action against D'Elegance for breach of contract, based on D'Elegance's refusal to allow Mitchell to remove all of the C&D debris from New Hanover County and to pay Mitchell in full for the

debris he did remove; common law fraud, based on D'Elegance's inducement of Mitchell into entering the agreement with D'Elegance by deceiving him into believing that he would have the right to remove the vegetative debris in New Hanover County; and for Chapter 75 violations, based on D'Elegance's deceiving Mitchell into believing he would have the right to remove all of the vegetative debris in New Hanover County, on D'Elegance's attempts to hire away Mitchell's truckers, and on D'Elegance's attempt to have Mitchell execute a back-dated contract as a precondition of payment for work Mitchell had already completed.[5] D'Elegance counter-claimed against Mitchell for breach of contract, asserting that Mitchell had failed to meet the 5,000-cubic-yards per-day quota and had failed to pay his subcontractors in a timely fashion. D'Elegance refused to seriously discuss settlement prior to trial despite a statement by Mitchell's counsel that he was fairly certain that Mitchell would settle the suit for $350,000.

At trial, Robert Franklin Coleman testified for Mitchell on the subject of damages. Coleman, who had 18 years of experience with debris removal analysis, was qualified as an expert in the field of debris removal. He testified that based on his experience, Mitchell would have incurred loading and overhead costs of approximately $2.00 per cubic yard in removing the C&D debris that he was prevented from removing, and that based on Mitchell's prior arrangement with a trucking company, his hauling costs would have been $2.10 per cubic yard. Coleman testified that Mitchell's costs for removing the 29,358 cubic yards Mitchell actually removed amounted to $188,827 (including overhead of $58,717) and that he was not aware of any amounts paid directly to Mitchell's subcontractors by

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[5] S&D asserted a cause of action against Waste Control and Waste Control's surety pursuant to the Miller Act. See 40 U.S.C.A. §§ 270a-270d (West 1986 & Supp. 2000). This claim serves as the basis for subject matter jurisdiction in this action.

D'Elegance.[6] After the close of Mitchell's case, D'Elegance moved unsuccessfully for judgment as a matter of law on the grounds, inter alia, that Mitchell breached his contract as a matter of law and that he failed to prove lost profits to a reasonable certainty.

Following the trial, the jury answered special interrogatories stating, as relevant here, (1) that D'Elegance breached its contract with Mitchell regarding C&D removal, causing Mitchell to sustain damages in the amount of $400,000; (2) that D'Elegance defrauded Mitchell into believing that the contract would include the removal of vegetative debris, entitling Mitchell to $100,000 in compensatory and $500,000 in punitive damages; (3) that D'Elegance committed all of the conduct alleged to be violative of Chapter 75, and that all of the conduct was "in

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6 Coleman calculated the total amount to which Mitchell would have been entitled under the contract had it been performed in its entirety by multiplying the number of cubic yards of debris that the contract entitled Mitchell to remove--195,917--by the $6.75-per-cubic-yard agreed-upon price, for a total of $1,322,440. Coleman then calculated the total costs Mitchell would have incurred by adding the costs Mitchell actually incurred in removing the 29,358 cubic yards of debris he did remove--$188,827--to the costs Coleman projected Mitchell would have incurred had he been allowed to remove the remaining 166,559 cubic yards of C&D debris. Based on his experience, Coleman determined that Mitchell would have incurred loading and overhead costs of approximately $2.00 per cubic yard and a hauling cost of $2.10 per cubic yard. The $2.10 was based on the price quotation Mitchell had obtained. Multiplying the $4.10-per-cubic-yard cost by 166,559 cubic yards, Coleman concluded that Mitchell's costs for the C&D debris removal he was prevented from doing would have been $682,892. Adding that figure to the $188,827 in costs Coleman stated that Mitchell incurred for the debris he actually removed, Coleman computed that Mitchell's total costs to perform all work under the contract would have been $871,719. Subtracting that figure from the gross amount to which Mitchell would have been entitled for performing all of the work--$1,322,440-and further subtracting the amount Mitchell was actually paid--$55,344--Coleman arrived at a total of $395,377 in damages to which Mitchell was entitled for D'Elegance's breach of the contract.

commerce" or "affecting commerce"; and (4) that Mitchell breached his contract with D'Elegance, entitling D'Elegance to nominal damages in the amount of one dollar.

Mitchell elected to recover damages pursuant to Chapter 75 and moved to treble the entire $500,000 in compensatory damages awarded by the jury. See N.C. Gen. Stat.§ 75-16. D'Elegance renewed its motion for judgment as a matter of law, and in the alternative for a new trial or to amend the judgment. See Fed. R. Civ. P. 59. As is relevant here, D'Elegance contended that Mitchell had failed to present sufficient evidence of damages as the result of D'Elegance's fraud; that Mitchell failed to present sufficient evidence of lost profits from the breach of contract; that the findings by the jury that each party was liable to the other for breach of contract were inconsistent; and that the punitive damages award should be set aside.

The district court set aside the fraud verdict, ruling that Mitchell had failed to prove his lost profits from D'Elegance's fraud to a reasonable degree of certainty. The court further determined that Mitchell's election to treble his compensatory damages under Chapter 75 mooted D'Elegance's motion to set aside the punitive damages award. The court denied D'Elegance's motions for judgment as a matter of law and for a new trial on the breach of contract claim. Regarding the Chapter 75 claim, the court ruled that the $400,000 in damages awarded by the jury for breach of contract could not be trebled because the jury made no specific findings regarding the nature of the conduct underlying the breach such that the district court could find that conduct unfair or deceptive. The court nevertheless awarded Mitchell $126,231 in attorneys' fees under Chapter 75 on the basis that the fraud constituted a Chapter 75 violation.[7] The court ruled that Mitchell was the prevailing party on the Chapter 75 claim despite the fact that he was

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[7] Mitchell also was awarded $8,865.80 in costs, as well as pre- and post-judgment interest on the $400,000 verdict.

awarded no damages under that cause of action, and the court found that D'Elegance's fraud was willful and that it unwarrantedly refused to settle this claim.

D'Elegance appeals the denial of its motion for judgment as a matter of law on Mitchell's breach of contract claim and the award of attorneys' fees. Mitchell cross-appeals the decision to set aside the fraud verdict as well as the failure of the district court to treble all compensatory damages pursuant to N.C. Gen. Stat.§ 75-16. Subsequent to noticing his cross-appeal, Mitchell moved successfully to register the judgment against D'Elegance in the Middle and Southern Districts of Florida. See 28 U.S.C.A. § 1963 (West Supp. 2000). D'Elegance appeals that ruling as well.

II.

D'Elegance first maintains that the district court erred in denying its motion for judgment as a matter of law on Mitchell's breach of contract claim, arguing that any breach by D'Elegance was excused by Mitchell's prior material breach and that Mitchell's evidence of damages was insufficient. We will address these arguments seriatim.

The function of this court is to resolve state law issues as we predict the highest court in the state would resolve them. See Doe v. Doe, 973 F.2d 237, 240 (4th Cir. 1992). Under North Carolina law, "[t]he general rule governing bilateral contracts requires that if either party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further." Coleman v. Shirlen, 281 S.E.2d 431, 434 (N.C. Ct. App. 1981). In the event of an unexcused breach of contract, the measure of damages is the amount that reasonably may be supposed to have been contemplated by the parties when they entered into the agreement or which will compensate the injured party as if the contract had been fulfilled. See Weyerhaeuser Co. v. Goodwin Bldg. Supply Co., 234 S.E.2d

605, 607 (N.C. 1977). In order to recover lost profits as a component of damages, a plaintiff must prove the existence and amount of lost profits to a reasonable certainty. See Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578, 585 (N.C. 1987). And, in order for lost profits to be proven to a reasonable certainty, cost estimates must be supported by facts in the record. See Tillis v. Calvine Cotton Mills, Inc., 111 S.E.2d 606, 613 (N.C. 1959).

A motion for judgment as a matter of law should be denied if the district court determines that substantial evidence exists upon which a jury could find for the nonmovant, viewing the evidence in the light most favorable to the nonmovant. See Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383 (4th Cir. 1995). We review the decision of the district court on a motion for judgment as a matter of law de novo. See id.

A.

D'Elegance advances two arguments as to why its breach of the parties' contract was excused as a matter of law. D'Elegance first contends that its breach was excused because Mitchell himself materially breached the contract by failing to meet the 5,000-cubic-yards-per-day quota. We disagree. D'Elegance's president testified that the quota was D'Elegance's and that Mitchell was not required to meet it. Moreover, assuming arguendo that Mitchell had contracted to remove a certain volume of debris, the jury reasonably could have concluded that D'Elegance prevented Mitchell from doing so by allowing him to work only in areas where D'Elegance knew his productivity would be low. See Goldston Bros. v. Newkirk, 64 S.E.2d 424, 427 (N.C. 1951) (explaining that "[a]s a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the adversary party"). Accordingly, substantial evidence supports a conclusion that D'Elegance's breach of contract

was not legally excused by any failure on the part of Mitchell to meet the quota.[8]

D'Elegance also contends that its breach was excused by Mitchell's failure to pay his subcontractors in a timely fashion. Again, we disagree. Even assuming that Mitchell was contractually obligated to D'Elegance to pay his subcontractors promptly, a fact finder reasonably could have concluded that by allowing Mitchell to do only the most costly C&D work and failing to pay him in full for the work he actually performed, D'Elegance prevented Mitchell from obtaining the money necessary to pay his subcontractors promptly.[9] See id. Accordingly, substantial evidence supports a conclusion that D'Elegance's breach was not legally excused by Mitchell's failure to timely pay its subcontractors. The district court therefore correctly denied D'Elegance's motion for judgment as a matter of law on the breach of contract claim on the theory that D'Elegance's breaches were excused as a matter of law.

B.

We also conclude that the district court correctly determined that Mitchell's evidence regarding breach of contract damages was sufficient to justify the denial of D'Elegance's motion for judgment as a matter of law on that cause of action.

We note initially that a failure to prove damages is not grounds for a judgment as a matter of law on a breach of contract claim because proof of the other elements of such a

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[8] As we have already noted, D'Elegance argued before the district court that the findings by the jury that each party was liable to the other for breach of contract were inconsistent and therefore warranted a new trial. The district court rejected this argument, however, and D'Elegance has abandoned it on appeal.

[9] Indeed, testimony in the record indicated that D'Elegance's payments to Mitchell were not even sufficient to pay Mitchell's overhead, let alone leave Mitchell with money to pay his subcontractors.

claim entitles a plaintiff to at least nominal damages. See Robbins v. C.W. Myers Trading Post, Inc., 111 S.E.2d 884, 886 (N.C. 1960). Moreover, a reasonable jury could have awarded Mitchell compensatory damages on his breach of contract claim on the basis that D'Elegance failed to pay Mitchell in full in compliance with the terms of the parties' contract for the debris Mitchell actually removed.[10] See Weyerhaeuser, 234 S.E.2d at 607. Nevertheless, we address D'Elegance's arguments that Mitchell failed to produce sufficient evidence of lost profits from the work he was prevented from doing.[11]

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[10] D'Elegance contends that the district court erred in stating that Mitchell was owed $62,232.54 for work actually performed, arguing that $58,594.30 is the proper amount. This discrepancy is due to D'Elegance's assertion that on October 10 and 11, 1996 Mitchell had no crews to load debris and that D'Elegance loaded the debris for Mitchell before he hauled it away. D'Elegance contends that Mitchell was entitled to only $5.00 per cubic yard for these days rather than the $6.75 that Mitchell was due under the contract for each cubic yard of debris that he loaded and hauled. Because Mitchell presented evidence that he did indeed load and haul the debris on October 10 and 11, however, a reasonable jury could have determined that Mitchell was owed $62,232.54, rather than $58,594.30, for the work he actually completed.

[11] Besides arguing that Mitchell failed to prove lost profits to a reasonable certainty, D'Elegance argues alternatively that it was entitled to judgment as a matter of law on the breach of contract claim because the $400,000 verdict was more than the evidence justified even assuming that Mitchell sufficiently proved lost profits. D'Elegance is incorrect. Whether the verdict was in an amount greater than that justified by the evidence is irrelevant to whether a jury reasonably could have returned a verdict against D'Elegance on the breach of contract cause of action, and hence whether D'Elegance was entitled to judgment as a matter of law. Moreover, the amount of the verdict was fully justified by the evidence. Mitchell removed 29,358 cubic yards of C&D debris. At $6.75 per cubic yard, he was entitled to be paid $198,166.50 for that work, but in fact D'Elegance paid a total of only $135,937.33 to Mitchell and his subcontractors, leaving $62,229.17 as the amount to which Mitchell was entitled from D'Elegance for the work he actually performed. As for the C&D debris that Mitchell was prevented from removing, Coleman opined that Mitchell would have incurred costs of $4.10 per cubic yard.

D'Elegance first maintains that Mitchell failed to prove to a reasonable certainty his lost profits on the C&D debris he was prevented from removing because Coleman was not aware of certain facts when he opined that the costs Mitchell would have incurred in removing that debris would have been $4.10 per cubic yard. Specifically, D'Elegance argues that Coleman believed that Mitchell had incurred costs of $188,827 in removing the debris that he was allowed to remove, when in fact that amount did not include $80,593.33 paid directly to Mitchell's subcontractors by D'Elegance.[12] D'Elegance's argument is without merit, however, because Coleman's opinion regarding the amount of costs Mitchell would have incurred in removing the C&D debris he was prevented from removing was not based on the costs Mitchell incurred in performing the work actually completed. Coleman did answer "[y]es" to the question, "[I]f you are wrong about the real costs of Mike Mitchell between October 4 and October 29, that makes all the other numbers you gave the jury invalid and you would have to refigure; wouldn't you?" J.A. 206. However, viewing the testimony in the light most favorable to Mitchell, we conclude that Coleman was stating only that his final damages figure would have to be recalculated, not that every component of

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Since he would have been paid $6.75 per cubic yard, he would have realized a profit of $2.65 per cubic yard. Because Mitchell was prevented from removing 166,559 cubic yards of debris, he was deprived of a profit of $441,381.35 for the work he was prevented from doing. Adding that amount to the amount Mitchell was owed for the work he did perform indicates that an award of $503,610.52 was necessary to compensate Mitchell as if the contract had been fully performed. Accordingly, the $400,000 verdict was within the range justified by the evidence.

[12] D'Elegance argues that the amount of costs of which Coleman was unaware was actually $135,937.33, not $80,593.33. However, $135,937.33 represented the total amount that D'Elegance paid Mitchell and Mitchell's subcontractors. Of that amount, $55,344 that was paid to Mitchell was not a cost incurred by him in completing the work

his calculation--including, for example, the $2.10-per-cubic-yard trucking-fee figure--would have to be reconsidered.

Citing Catoe v. Helms Construction & Concrete Co., 372 S.E.2d 331 (N.C. Ct. App. 1988), D'Elegance contends that because Coleman testified only to estimates of the costs Mitchell would have incurred in removing the C&D debris that he was prevented from removing, the evidence of lost profits was insufficient. In Catoe, the plaintiff claimed entitlement to 50 percent of the profits for work that had already been completed, but failed to produce evidence of the total proceeds generated by the work or the total costs incurred in performing the work. See Catoe, 372 S.E.2d at 333-34. Although the plaintiff offered his estimates of both the costs and proceeds of most of the work, the court held that these estimates alone did not provide a sufficient factual basis for an award of lost profits because the plaintiff "merely speculated as to the precise costs incurred and profits earned." Id. at 335.

We do not believe that the North Carolina Supreme Court would view Coleman's cost analysis as mere speculation, however. Coleman testified that Mitchell's costs would have been $2.00 per cubic yard for overhead and loading costs and $2.10 per cubic yard for trucking. Mitchell testified that he had an agreement with a trucking company to haul C&D debris for $2.10 per cubic yard, leaving only the $2.00 figure to be substantiated. Coleman, who was qualified as an expert in the field of debris removal, testified that he had 18 years of experience with analyzing storm debris removal, and that he had performed thousands of debris removal analyses to determine the cost of repairing storm damage. We therefore conclude that Coleman's testimony that $2.00 per cubic yard was a reasonable and

realistic rate for overhead and loading was sufficient.[13] Moreover, Coleman's claim that Mitchell could have removed the C&D debris for $2.00 per cubic yard plus hauling costs was supported by a document in evidence in which Waste Control stated that its subcontractor's non-hauling costs were $1.56 per cubic yard. Coleman's projected cost was also very close to the non-hauling cost figure of $2.25 per cubic yard offered by Mitchell based on his 19 to 20 years of experience in the field of debris removal. For all of these reasons, we conclude that Mitchell's evidence of lost profits was sufficient.

III.

D'Elegance next maintains that the district court erred in awarding attorneys' fees to Mitchell pursuant to Chapter 75. D'Elegance makes three arguments challenging the fee award, and we will discuss them seriatim.

Chapter 75 prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). The trial court may, in its discretion, award a reasonable attorneys' fee to a plaintiff alleging a Chapter 75 violation if (1) the plaintiff is the prevailing party; (2) the defendant willfully engaged in a deceptive act or practice; and (3) the defendant unwarrantedly refused to

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[13] D'Elegance contends that Coleman's testimony was undermined by the fact that Mitchell's costs in removing the C&D debris that he actually removed far exceeded the $4.10 per cubic yard that Coleman testified it would have cost Mitchell to perform the remaining work. Although D'Elegance was free to make that argument to the jury, Mitchell's evidence regarding all of the adverse circumstances that he faced in performing that work gives rise to the reasonable inference that his costs for removing the debris he was allowed to remove would not be a good indicator of the costs he would have incurred in performing the more profitable work he was prevented from doing.

fully resolve the matter.[14] See N.C. Gen. Stat. § 75-16.1(1) (1999). "It is well settled that district courts have considerable discretion in awarding attorneys' fees, and we must not overturn an award by the district court unless it is clearly wrong." Colonial Williamsburg Found. v. Kittinger Co., 38 F.3d 133, 138 (4th Cir. 1994) (citation omitted).

D'Elegance first claims that there was no evidence presented to support a finding that it willfully engaged in a deceptive act or practice and that the jury did not make such a finding. D'Elegance does not deny that there was evidence of fraud or that the jury found fraud, but contends that the finding of fraud does not encompass a finding that D'Elegance willfully engaged in the deceptive act. D'Elegance is incorrect. Intent to deceive is indeed an element of fraud.[15] See Helms v. Holland, 478 S.E.2d 513, 516 (N.C. Ct. App. 1996)

D'Elegance next asserts that the district court erred in finding that D'Elegance unwarrantedly refused to fully resolve this case. We disagree. The district court determined that D'Elegance refused to seriously discuss settlement, and D'Elegance does not challenge that factual determination. D'Elegance contends that the fact that the $400,000 verdict exceeded Mitchell's best settlement proposal by only $50,000 demonstrates that D'Elegance's refusal to settle this case was not unwarranted. However, even ignoring the more

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[14] Although Mitchell was awarded no compensatory damages on the Chapter 75 claim, D'Elegance does not challenge on appeal the conclusion of the district court that Mitchell was the prevailing party on that claim.

[15] D'Elegance argues that the fact that § 75-16.1(1) provides that in order to recover attorneys' fees a plaintiff must prove that the Chapter 75 violation was willful demonstrates that proof of willfulness is not necessary to establish fraud. D'Elegance's reasoning is flawed. The inclusion of the willfulness requirement in § 75-16.1(1) indicates only that proof of willfulness is not required to prove a Chapter 75 violation. It has no bearing whatsoever on the question of whether proof of a particular violation--here fraud--encompasses proof of willfulness.

than $130,000 in attorneys' fees and costs awarded to Mitchell, we simply fail to understand how evidence that D'Elegance could have settled this case for less than the amount of the judgment entered against it could vindicate the decision not to attempt a settlement.

With regard to the reasonableness of the amount of fees awarded, D'Elegance argues that the district court erred in failing to make specific findings regarding the twelve factors discussed in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978).[16] We have held that a district court must consider these factors in determining an award of attorneys' fees. See id. at 226. Here, the district court specifically found that the time expended by Mitchell's attorneys was reasonable considering the nature and difficulty of the facts and law involved in this matter, that the hourly rates charged were reasonable in light of counsel's experience and the customary rate for such work in the locality, and that Mitchell's attorneys consistently demonstrated competence during the litigation. D'Elegance made several objections to Mitchell's fee application, and the district court thoroughly reviewed Mitchell's documentation and application for fees,

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[16] The factors include:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber, 577 F.2d at 226 n.28.

and awarded approximately $4,000 less than the amount Mitchell requested. This reduction is strong evidence that the district court carefully considered the fee application and that the award is proper. See Alexander S. v. Boyd, 113 F.3d 1373, 1391 (4th Cir. 1997); Colonial Williamsburg Found., 38 F.3d at 138. We cannot say under the circumstances that the district court abused its discretion in not providing specific detailed findings regarding all of the factors. See Alexander S., 113 F.3d at 1391; Colonial Williamsburg Found., 38 F.3d at 138.

IV.

D'Elegance finally maintains that the district court erred in registering the judgment. We disagree.

Pursuant to 28 U.S.C.A. § 1963, when an appeal is pending, a plaintiff may register a judgment for good cause shown. Good cause exists when the defendant has substantial property in the foreign district and insufficient property in the rendering district to satisfy the judgment. See David D. Siegel, Commentary on 1988 Revision, 28 U.S.C.A. § 1963 (West 1994).

Here, Mitchell stated in his motion to register the judgment that an asset search indicated that D'Elegance had assets available for execution in the Middle and Southern Districts of Florida and noted that Mitchell had been unable to locate any assets owned by D'Elegance in North Carolina. D'Elegance did not dispute that it owned significant assets in Florida and none in North Carolina. D'Elegance argues on appeal, however, that a pending lawsuit it has against Waste Control's surety should be considered an asset in North Carolina and therefore prevent registration of the judgment in Florida. D'Elegance offers no authority for its position, however, and we are aware of none.

D'Elegance also argues that registration of this judgment while Mitchell's cross-appeal is pending violates the rule that one who voluntarily accepts the benefits of a

judgment waives any errors in the judgment. See Wohl v. Keene, 476 F.2d 171, 177 (4th Cir. 1973). We do not agree that the mere registration of a judgment can properly be characterized as acceptance of the benefits of that judgment. Moreover, Mitchell's actions in seeking to increase the probability that the judgment eventually will be satisfied is in no way inconsistent with his contention on cross-appeal that the amount of the judgment should be greater. See Gadsden v. Fripp, 330 F.2d 545, 548 (4th Cir. 1964) (explaining that an appeal is barred only when the circumstances "indicate an intention to finally compromise and settle a disputed claim . . . [and] bring the litigation to a definite conclusion upon a basis acceptable to all parties"). Accordingly, the district court did not err in registering the judgment.

V.

On cross-appeal, Mitchell maintains that the district court erred in holding that his evidence of fraud damages was insufficient to support a compensatory damages award, noting that he produced evidence that D'Elegance's fraud in inducing him to enter the contract caused him to incur costs that he would not have incurred had he not undertaken the New Hanover work. We agree.[17]

Although the district court stated in its order that Mitchell's only damages theory for his fraud claim was for lost profits, we have found nothing in the record to support that conclusion. Mitchell alleged in his amended complaint that he "reasonably relied upon D'Elegance's fraudulent misrepresentations and concealments to [his] detriment by fully mobilizing the Project, by executing the [Mitchell] subcontract, and by performing in good faith [his] obligations under [that] subcontract." J.A. 68A16-17. At trial, Mitchell offered evidence of costs of more than

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[17] Because we reverse the decision of the district court setting aside the award on this basis, we do not address Mitchell's argument that the evidence of lost profits also was sufficient to support the verdict.

$100,000 that he would not have incurred but for D'Elegance's inducing him to enter into the contract. Mitchell subsequently argued to the jury during closing argument--without objection from D'Elegance--that he was entitled to fraud damages for the costs he had incurred as a result of entering into the contract. The district court then charged the jury that if Mitchell proved the other elements of fraud, he was entitled to recover "the amount of actual damages caused by the fraudulent conduct of D'Elegance," Trial Tr., Aug. 14, 1998, at 124. Accordingly, substantial evidence supports the conclusion that Mitchell was entitled to compensatory damages in the amount of the costs he incurred as the result of entering into the contract with D'Elegance. We therefore hold that the district court erred in setting aside the $100,000 award on the ground that Mitchell failed to offer proof of entitlement to damages as the result of D'Elegance's fraud.

Mitchell also contends that the award should be trebled pursuant to N.C. Gen. Stat. § 75-16. We agree. In awarding attorneys' fees, the district court specifically found that D'Elegance's fraud constituted a Chapter 75 violation, and D'Elegance has not challenged that ruling on appeal. Accordingly, Mitchell is entitled to an award of $300,000 in the Chapter 75 cause of action. See N.C. Gen. Stat. § 75-16.

VI.

Mitchell argues that the district court also erred in failing to treble the $400,000 in compensatory damages that he was awarded for D'Elegance's breach of contract action pursuant to Chapter 75. See N.C. Gen. Stat. § 75-16. We disagree.

An essential element of a Chapter 75 cause of action is that the defendant's Chapter 75 violation proximately caused the plaintiff's injuries. See Ellis v. Smith-Broadhurst, Inc., 268 S.E.2d 271, 273-74 (N.C. Ct. App 1980). Whether the Chapter 75 violation proximately caused the injuries is a

factual question for the jury, see id. at 274, but whether the defendant's conduct is unfair or deceptive is a question of law for the court, see Hardy v. Toler, 218 S.E.2d 342, 345-46 (N.C. 1975).

Here, the jury found that D'Elegance breached its contract with Mitchell with regard to C&D removal in New Hanover County, causing Mitchell to sustain $400,000 in damages. However, there was no basis for the district court to determine that D'Elegance's conduct was unfair or deceptive because the jury made no finding regarding what specific conduct by D'Elegance gave rise to the $400,000 damage award.[18] Indeed, one component of Mitchell's breach of contract claim was that D'Elegance simply failed to pay Mitchell money owed under the parties' contract. Accordingly, there was no basis upon which the district court could determine that the conduct that caused Mitchell's damages violated Chapter 75. See United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981) (holding that "an ordinary contract breach" is not a Chapter 75 violation). The district court therefore correctly refused to treble the $400,000 award. See Stone v. Paradise Park Homes, Inc., 245 S.E.2d 801, 807 (N.C. Ct. App. 1978) (holding that damages for breach of express and implied warranties would not be trebled when the breach entitling the plaintiff to damages was not a violation of Chapter 75).

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[18] Mitchell notes that the jury found that D'Elegance committed specific wrongful conduct: improperly approaching some of Mitchell's truckers or subcontractors in an attempt to hire them away from Mitchell, and improperly attempting to coerce Mitchell to execute a back-dated contract which was substantially different from the original contract as a precondition for payment by D'Elegance to Mitchell. The jury made no finding, however, that the $400,000 in damages was necessary to compensate Mitchell for this conduct.

VII.

In sum, we affirm the denial of D'Elegance's motion for judgment as a matter of law on Mitchell's breach of contract claim, the denial of Mitchell's request to treble the $400,000 damage award, the award of attorneys' fees, and the registration of the judgment. However, we reverse the decision of the district court to set aside the $100,000 compensatory damage award, and we hold that Mitchell is entitled to have that award trebled as a result of his election to receive Chapter 75 remedies rather than remedies for common law fraud.

AFFIRMED IN PART AND REVERSED IN PART

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:97-CV-49-F2
Entered: November 03, 1998

UNITED STATES OF AMERICA,
for the use and benefit of
S & D LAND CLEARING, INC.
Plaintiff,

v. **ORDER**

ENVIRONMENTAL CORRECTIONS CORP.,
a/k/a WASTE CONTROL SERVICES;
D'ELEGANCE MANAGEMENT LIMITED, INC.;
and UNIVERSAL SURETY OF AMERICA,
Defendants.

On December 31, 1997, Malaco filed an amended complaint asserting five claims against defendant, D'Elegance Management Limited, Inc. (hereinafter "D'Elegance"). These claims were breach of contract, quantum meruit fraud, negligent misrepresentation and unfair and deceptive trade practices. in addition to seeking compensation and treble damages, Malaco sought punitive damages against D'Elegance. D'Elegance counterclaimed against Malaco for breach of Contract.

In a separate action, D'Elegance had sued Universal Surety Company and the predecessor corporation of Waste Control Services[1] on claims arising from the same events

[1] Environmental Corrections Corp., a/k/a Waste Control Services declared bankruptcy during the pendency of this litigation, and this action is stayed as to that entity.

which gave rise to Malaco's lawsuit Upon D'Elegance's motion, the court consolidated the two cases.

On August 4, 1998, the trial of the consolidated actions began, and on August 14, 1998 the court submitted Malaco's claims of breach of contract, fraud, and unfair and deceptive trade practices against D'Elegance and D'Elegance's counterclaim for breach of contract, to the jury. On August 17, 1998, the jury awarded Malaco $400,000.00 on the breach of contract claim, $1,00,000.00 on the fraud claim, and $500,000,00 in punitive damages, The jury awarded the nominal sum of $1 600 to D'Elegance on its claim that Malaco also had breached the parties' contract. As explained more fully below, the court submitted to the jury only the question of the amount of Universal's liability under the subject bonds, and the jury responded with the figure of $369,623.23.

This matter currently is before the court for ruling on:

a. Malaco's motions
   (i) for election of remedies and motion to treble damages;
   (ii) for costs and attorney's fees,
   (iii) for pre-judgment and post-judgment interest; and
   (iv) for bill of costs,
b. D'Elegance's motion for judgment as a matter of law or for a new trial or to alter or amend the judgment;
c. Universal's motions
   (i) for judgment as a mater of law or for a new trial; and
   (ii) to amend cross-claim answer.

I. D'ELEGANCE'S MOTIONS & MALACO'S ELECTION OF REMEDIES.

A. Fraud in the Inducement of Contract

The jury found that D'Elegance's conduct in inducing the contract with Malaco was fraudulent D'Elegance's conduct in fraudulently including Malaco to enter the contract was "immoral, unethical, unscrupulous, oppressive," and amounted to an inequitable assertion of its power over Malaco. *See Southern Building Maintenance, Inc., v. Osborne,* 127 N.C. App. 327, 334, 489 S.E.2d 892, 897 (1997); Accordingly, the court finds as a matter of law that such conduct constituted a violation of N.C. GEN. STAT. § 75-1.1. *See Powell v. Wold,* 88 N.C. App. 61, 68, 362 SE.2d 796, 800 (1987).

Malaco's theory of the damages it suffered by D'Elegance's fraudulent inducement was one of lost profit. The jury awarded Malaco $100,000.00 compensatory damages and $500,000.00 punitive damages in relation to the fraud claim. North Carolina law requires that damages for recovery of lost profits be proved within a reasonable degree of certainty *See, Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (citing *McNamara v. Wilmington Mall Realty Corp,* 121 N.C App. 400, 407-08, 466 S.E.2d 324, 330, *disc. rev. denied,* 343 N.C. 307, 471 S.E.2d 73 (1996)). Malaco sought to calculate its compensatory damages by multiplying the total number of cubic yards of vegetative debris removed by others in New Hanover County, by the amount of profit it would have earned per cubic yard had it performed the work. The amount of profit per cubic yard would be determined by subtracting Malaco's cost for performing that work from the amount it would be paid by D'Elegance.

To prove its lost profits under this theory, Malaco was required to present to the jury competent evidence of the

following: (i) the quantity of vegetative debris actually removed, (ii) what Malaco would have been paid for removing that amount of vegetative debris, and (iii) how much it would have cost Malaco to do so. However, Malaco failed to present any admissible evidence concerning the quantity of vegetative debris that actually was hauled. Frank Coleman, Malaco's opinion witness, testified that in forming his opinions on Malaco's lost profits, he relied on the hearsay statements of an unnamed New Hanover County official, However, when an expert witness relies on otherwise inadmissible evidence in formulating his or her opinion, that information is *not* substantive evidence.

> Rule 703 [of the FEDERAL RULES OF EVIDENCE] allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion. *Rules 702 and 703 do not, however, permit the "admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.* See Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984). Rather, "*Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert property relies, to* be *admitted to explain the basis of the experts opinion.* Id. Moreover, such materials should not be admitted if the risk of prejudice substantially outweighs their probative value. See FED. R. EVID. 403; Nachsheim v. Beech Aircraft Corp., 847 F.2d 1261 1270-71 (7th Cir. 1988). *When inadmissible materials are admitted for explanatory purposes, the opposing party is entitled to a limiting instruction to the jury that the evidence may*

> *be considered "solely as a basis for the expert opinion and not as substantive evidence."* Paddack, 745 F.2d at 1262.

Engebretsen v. Fairfield Aircraft Corp., 21 F.3d 7219 728-29 (6th Cir, 1994) (emphasis added).

Because Malaco introduced no substantive evidence concerning the amount of vegetative debris it was not permitted to remove from New Hanover County because the debris was removed by others, the jury could not have awarded damages for lost profits with the degree of certainty required by North Carolina law, Accordingly, the court finds as a matter of law that Malaco is not entitled to recover compensatory damages for D'Elegance's fraudulent inducement of contract by misrepresenting to Malaco that it would be allowed to remove vegetative debris from New Hanover County. The jury's verdict awarding $1 00,000.00 against D'Elegance for fraud, therefore, is SET ASIDE, Moreover, because the court has determined that Malaco did not prove its compensatory damages, there are no fraud damages to treble under § 75-1.1. For that reasons, Malaco's motion to treble its compensatory damages on the fraud claim is DENIED, Malaco's election to treble its damages under § 75-1.1 MOOTS D'Elegance's motion to set aside the punitive damages award.

B. Breach of Contract

It was Malaco's position that D'Elegance breached the parties' contract by refusing to permit Malaco to remove all the construction and demolition ("C&D") debris in New Hanover County, The jury agreed. The damages. evidence at trial as to Malaco's breach of contract claim contained two components: first, Malaco demonstrated that it was owed $198,169.87 for work it actually was permitted to perform under its contract with D'Elegance. It stipulated that

D'Elegance had paid $135,937.33 to Malaco's sub-contractors, leaving a balance due from D'Elegance to Malaco of $62,232.54.

The second component of the breach of contract damages was Malaco's lost profits which occurred as a result of D'Elegance's failure to permit Malaco to haul all the C&D material in New Hanover County. There is no dispute that the quantity of C&D for removal in New Hanover County was 166,559 cubic yards. Malaco's opinion witness estimated Malaco's costs for C&D removal in New Hanover would have been $4.10 per cubic yard, resulting in a profit to Malaco of $2.65 per cubic yard. The court finds that Malaco's breach of contract damages evidence was sufficiently definite and accurate under North Carolina law. *See Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987).

D'Elegance also argues that because the jury found that both D'Elegance and Malaco breached their contract, the findings are irreconcilable and the court, therefore, should order a new trial. This contention is meritless. D'Elegance alleged and presented evidence at trial that Malaco failed to meet certain quantity quotas, and that Malaco failed to "appropriately and timely pay" its workers. Malaco never denied the allegation, but presented substantial evidence at trial that both literal breaches of the parties' contract resulted from D'Elegance's own wrongful conduct That is, Malaco presented evidence, and the jury found, that D'Elegance interfered with Malaco's performance by luring away Malaco's truck drivers with promises of higher pay. In addition, Malaco presented evidence tending to show that it could not pay its workers in a timely fashion because D'Elegance did not pay Malaco. In fact, the jury found, in response to a special interrogatory that on November 4, 1996, D'Elegance improperly attempted to force Malaco to execute a black-dated, eleven page typewritten contract

which was substantially different from the original oral contract *as a precondition for partial payment* by D'Elegance to Malaco. Malaco's principal, Mike Mitchell, refused to do so.

As Malaco points out, the rule is well-established in North Carolina that a party to a contract who prevents the performance of the other, or makes it impossible by his own act, will not be permitted to take advantage of the non-performance, *See W.E. Garrison Grading Co. v. Piracci Constr. Co., Inc.*, 27 N.C. App. 725, 221 S.E.2d 512, 51 (1975). Thus, although there was no question that Malaco failed to perform fully under the parties' contract, the non-performance was caused by D'Elegance's wrongful conduct and, at any rate, was not material as evidenced by the jury's awarding D'Elegance the nominal sum of $1.00 in damages. Under these circumstances, the jury's verdict on the reciprocal breach of contract claims is not inconsistent.

For the foregoing reasons, D'Elegance's motion for judgment as a matter of law as to the breach of contract claim or, in the alternative, for a new trial, is DENIED.

However, Malaco's breach of contract damages are not subject to trebling under § 75-1.l, because there was no finding by the jury of any "substantial aggravating circumstances *attending the breach"* which could support such trebling. *Canady v. Crestar Mortgage Corp.,* 109 F.3d 969, 975 (4th Cir. 1997) (emphasis added). The special interrogatories presented to and answered by the jury focused on D'Elegance's conduct related to Malaco's *fraud* claim, not its breach of contract claim, Therefore, although there are ample factual findings supporting a trebling of the fraud damages [had any been property proved], there are none of record related to the conduct resulting in the determination that D'Elegance breached its contract with Malaco by refusing to permit Malaco to remove all of the C&D material in New Hanover County and failing to pay Malaco in full for the C&D removal it did perform.

II. MALACO'S MOTION FOR PRE-JUDGMENT & POST-JUDGMENT INTEREST

A. Rate of Interest

Malaco alleged that jurisdiction in this case was predicated upon 28 U.S.C. 1332 (diversity of citizenship), 28 U.S.C. § 1352 (bonds executed under federal law), 40 U.S.C, § 270a&b (Miller Act), and 28 U.S.C. § 1367 (supplemental jurisdiction). While diversity was alleged, diversity did not exist among the parties, because S&D (Malaco's assignee and co-plaintiff) and D'Elegance both-are Florida corporations. *See* 28 U.S.C. § 1352. Jurisdiction therefore is predicated on one of the other bases alleged.

Because jurisdiction was not predicated upon diversity of the parties' citizenship, it is within this court's discretion to set a rate of interest in accordance with federal law. *See Federal Deposit Insurance Corp. v. British-American Corp.*, 755 F. Supp 1314, 1328 (E.D.N.C. 1991). The court deems it proper to look to 28 U.S.C. § 1961, the federal post-judgment interest statute, to determine what the appropriate prejudgment interest rate should be. *See id.* The court, in its discretion, determines that both the pre-judgment and post-judgment interest rate shall be determined pursuant to § 1961.

B. Pre-Judgment Interest - Compensatory Damages

Malaco is entitled to recover pre-judgment interest on its claim for breach of contract from December 12, 1996. Accordingly, Malaco is awarded pre-judgment interest on the $400,000,00 breach of contract award at the rate provided for pursuant to § 1961, from December 12, 1996, though August 17, 1998.

C. Post-Judgment Interest

Malaco is awarded post-judgment interest on its award from August 18, 1998, at the rate prescribed according to 28 U.S.C. § 1961.

III. MALACO'S MOTION FOR ATTORNEY'S FEES

In order to recover its attorney's fees under N.C. GEN. STAT. § 75-16.1. Malaco must demonstrate, and the court must find, that (i) Malaco is the prevailing party, (ii) D'Elegance willfully engaged in the acts which the court finds unfair or deceptive; and (iii) D'Elegance made an unwarranted refusal to fully resolve this matter. *See Evans v. Full Circle Productions, Inc.,* 114 N.C. App. 777, 781, 443 S.E.2d 108, 110 (1994).

In order to be the "prevailing party" within the meaning of § 75-16.1, the plaintiff must prove, not only a violation of § 75-1.1 by the defendant, but also that plaintiff has suffered actual injury as a result of that violation. *See Mayton v. Hiatt's Used Cars, Inc.,* 45 N.C. App, 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied,* 300 N.C. 198, 269 S.E.2d 624 (1980). Here, Malaco clearly is the prevailing party because the jury found that it had been the victim of D'Elegance's fraud, and fumble, found facts which the court determined as a matter of law to be unfair or deceptive pursuant to § 75-1.1. And, as demonstrated by its attempt to award Malaco $1 00,000,00 on the fraud claim, the jury found that the fraudulent conduct of D'Elegance resulted in actual injury to Malaco. *See, e.g., Edwards v. West,* 495 S.E.2d 920, 924 (N.C. App.), *cert, denied,* 348 N.C. 282i 501 S.E.2d 918 (1988); *Powell v. Wold,* 88 N.C. App. at 68, 362 S.E.2d at 800 (proof of fraud necessarily constitutes proof of unfair and deceptive trade practices). Accordingly, the court

finds that Malaco is the "prevailing party as that term is used in N.C. GEN. STAT. § 75-16.1.

The jury's answers to the special interrogatories also reveal that it found D'Elegance's fraudulent conduct to have been willful. For example, the jury answered in the affirmative the following special interrogatories:

> 3. Did D'Elegance falsely represent to Malaco that its contract would include the removal of vegetative debris *when in fact, D'Elegance knew that removal of vegetative debris had been or would be removed* from its contract?
>
> * * *
>
> 8. (i) Prior to the execution of its subcontract with Malaco, did D'Elegance represent to Malaco that the subcontract would cover the removal of all debris in New Hanover County, *even though D'Elegance was aware that Malaco would only be allowed to remove construction and demolition (C&D) debris?*
>
> (ii) Prior to execution of its subcontract with Malaco, did D'Elegance *intentionally conceal from, and fail to disclose to Malaco,* the fact that Malaco would only be allowed to remove C&D debris?

Verdict Sheet, Special Interrogatories (emphasis added). Accordingly, the court concludes that D'Elegance's unfair and deceptive conduct was willful.

The parties' memoranda regarding the attorney's fee motion reveal pertinent information about their settlement postures. According to the affidavit of Malaco's counsel, A. Graham Shirley, S&D first offered to settle the lawsuit to avoid joinder of Mike Mitchell and Malaco, for the sum of $80,000,00, but D'Elegance never responded to the offer. Mr. Shirley next explains that during a conversation with counsel for D'Elegance on July 22, 1998, the latter requested that Mr. Shirley propose a settlement figure for discussion with D'Elegance. Mr. Shirley advised that his clients had not provided a specific amount but that he felt certain they would settle for approximately $350,000.00. On July 27, 1998, counsel for D'Elegance advised Mr. Shirley that, since D'Elegance had to try its case against Universal in any event, it might as well go forward to trial on Malaco's claims against it also. In short, Mr. Shirley avers, at no time did D'Elegance offer to settle with the plaintiffs.

D'Elegance does not dispute any of Mr. Shirley's factual assertions. Rather, D'Elegance contends that its refusal to settle was not unwarranted, in light of the jury's verdict.

D'Elegance not only refused to fully settle this matter, the record is plain that D'Elegance steadfastly refused even to seriously discuss settlement. *See Barbee v. Atlantic Marine Sales & Services, Inc.*, 113 N.C. App. 80, 87, 437 SE.2d 682, 686 (1993) (where record rife with evidence of defendants intractability, court's findings on issues of willfulness and refusal to resolve matter supported award of attorney's fees), disc. rev. denied, 337 N.C. 689, 448 S.E.2d 516 (1994). Under the circumstances, the court finds that D'Elegance's conduct amounted to an unwarranted refusal to fully resolve this matter.

Although the court has determined that Malaco failed adequately to support the measures of its damages resulting

from D'Elegance's fraud, the fact of that fraud and, hence, of D'Elegance's committing unfair and deceptive trade practices, and the resulting injuries to Malaco, are amply documented in the record. The undersigned does not interpret the requirement that a plaintiff *show injuries* resulting from unfair or deceptive trade practices as also requiring that the plaintiff actually *recover damages* therefore. *Cf. Bailey v. LeBeau*, 79 N.C. App. 345, 339 S.E.2d 460, *modif. and aff'd*, 318 N.C. 411, 348 S.E.2d 524 (1986) (no evidence that plaintiff suffered any injury because of defendant's misrepresentation; error to award attorney's fees under § 75-16.1); *Taylor v. Foy*, 91 N.C. App. 82, 370 S.E.2d 442 (1988) (award of attorneys fees vacated where no verdict was returned against defendant), *aff'd*, 324 N.C. 331, 377 S.E.2d 745 (1989). Here, Malaco demonstrated that it was injured by D'Elegance's unfair and deceptive trade practices, and the jury returned a verdict against D'Elegance. That Malaco failed to prove the *measure of damages* resulting from those injuries does not preclude Malaco from recovering its attorney's fees pursuant to § 75-16.1.

The court has undertaken a thorough review of the documentation supporting Malaco's application for attorney's fees. Based on the courts familiarity with the case, the court finds that the time expended by Malaco's counsel was reasonable, considering the nature and difficulty of the facts as well as the law of case and the circumstances surrounding it; the hourly rates charged by Malaco's attorneys are reasonable and appropriate for the work in question, in light of counsel's years in practice and the customary rate for such work in this locality; and Malaco's counsel consistently demonstrated their ability and competence during the course of this litigation. See, *e.g.*, *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). Accordingly, the court has

determinated that the sum of $126,231.00[2] is a reasonable attorney's fee for Malaco's counsel's work in this litigation, and that $8,865.80 is a reasonable total of expenses incurred. Accordingly, the court is its discretion, awards Malaco its reasonable attorney's fees in the amount of $126,231.00, plus its expenses in the amount of $8,865.80.

IV. UNIVERSAL SURETY'S RENEWED MOTION FOR JUDGMENT AS A MATTER OR LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Following the jury trial of this matter, the undersigned conducted an informal telephone conference with counsel for D'Elegance and counsel for Universal. The subject of the conference was how best to deal with an allegedly inadvertent admission on behalf of Universal that its bond covered ill work performed under Waste Control's contract with the Corps of Engineers on the entire debris removal project The court had ruled just prior to trial that Universal was bound by the admission because D'Elegance otherwise would be unduly prejudiced. During the trial, however, D'Elegance's own witness, Mr. Alan Dodd, volunteered in his testimony on cross-examination by Universal's counsel, that he, on behalf of Waste Control Services, and surety agent Kevin McQuain, approached the Corps to suggest "rolling over" the initial bond amounts to cover subsequent delivery orders, not to exceed $2 million at a time. The court deemed such testimony to be contrary to D'Elegance's position that the bonds Universal issued to

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[2] The court also has considered D'Elegance's objections to various elements of Malaco's fee request, and has adjusted the total award to reflect such objections as the court has determined to be meritorious.

Waste Control in September, 1996,[3] for "Contract No. DACW54-96-D-0049" were intended to cover any and all work Waste Control performed under that Corps contract and, rather, supported Universal's position that funds would be obligated on individual delivery orders as received.

The court permitted the matter to go to the jury in the posture created by Universal's admission and the subsequent pre-trial ruling, but cautioned the parties repeatedly that the evidence at trial undermined the truth of the allegedly inadvertent admission, and that the court was contemplating declaring a mistrial on D'Elegance's claim against Universal under the bond in order to achieve a just and fair result based on an accurate and fully-developed record.

The procedural history leading up to this awkward state of affairs is as follows. In November, 1997, D'Elegance filed a cross-claim and complaint against Universal and Waste Control, in which it alleged in ¶ 7 that:

> On September 19, 1996 pursuant to the terms of the contract, Waste Control as principal, and Universal as surety, executed and delivered to the United States their payment bond, conditioned as required by the Miller Act for the protection of all persons, supplying labor and materials in the prosecution of the work provided for in the Prime Contract, A copy of the Payment bond is attached hereto as Exhibit "A."

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[3] The Payment Bond was in the penal sum of $250,000, and was accompanied by a $500,000 Performance Bond, issued on the same date. These documents were proffered as Defendant Universal's Exhibits 291 and 293, but not admitted, due to the court's pre-trial rulings. On September 24, 1996, a supplemental Payment Bond in the penal sum of $800,000, and a Performance Bond in the penal sum of $2 million were issued. These documents were proffered, but not admitted, as Defendant Universal's Exhibits 292 and 294.

As D'Elegance explained in its July 27, 1998, "Memorandum of Law Regarding Matters Not Pled,"

> Exhibit A to those pleadings consisted of three pages, The first page is a General Power of Attorney executed by Universal appointing Kevin L. McQuain as attorney-in-fact; the second page is a payment bond in the amount of $800,000 issued for contract number DACW54-96-D-0049; the third page is a performance bond issued for the same contract in the amount of $2,000,000.

D'Elegance Memorandum at 2. Universal's January 30, 1998, Answer in response to ¶ 7 was, "[Universal[admits paragraphs [sic] ¶ 7."

In its response to D'Elegance's January 1998, interrogatories, Universal identified Ms. Shelly Bolender as the only person who was involved on behalf of Universal in the issuance of bonds on the Corps project Universal included in its response the fact that Ms. Bolender no longer was employed with Universal and Universal did not know her whereabouts.

By order of February 20, 1998, former counsel for Universal was allowed to withdraw from representation, and Universal's present counsel was substituted. Present counsel has advised that as part of preparation of the defense, he undertook to locate Ms. Bolender who, unfortunately, had an unlisted telephone number. Counsel states he first located her on July 1, 1998, and talked with her by telephone. Universal obtained a Memorandum dated September 25, 1996, from Ms. Bolender to "File," the contents of which, again, tend to support Universal's theory of the bond coverage. The Memorandum was proffered as Defendant Universal's Exhibit 296, but not admitted.

The record reveals that after having spoken with Ms. Bolender, Universal's counsel served its Supplemental Response to D'Elegance's Interrogatories, which included the following:

> Universal denies liability and asserts as a defense in this matter the fact that the only bond issued by Universal related solely to the work covered under the Order for Supplies or Services, Delivery Order Number 0001, dated September 19, 1996 ("Delivery Order 0001") . . . To the extent that claims being asserted in this action arise out of or relate in any way to labor and/or materials which were outside the scope of Delivery Order 0001, such claims are not covered by the bond, and are not recoverable against Universal.

Universal's July 15, 1998, Supplemental Responses to D'Elegance's Interrogatories Nos. 2 & 7.

Universal's counsel learned on July 23rd that Ms. Bolender's physician denied her medical clearance to travel to North Carolina to testify at trial. On that date, counsel for Universal faxed a Notice of Deposition to opposing counsel, which indicated the date and time he had scheduled Ms. Bolender's deposition in Houston in order that opposing counsel could fly to Texas and return to Ft. Lauderdale on the same day. Counsel for D'Elegance, however, filed a Motion for Protective Order, seeking to prevent the deposition in light of the impending trial date, and for that reason, the court allowed the motion. [4]

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[4] Counsel for Universal traveled to Houston, nevertheless, and deposed Ms. Bolander. The court permitted Universal to proffer the original transcript of the videotaped deposition for the record as Universal's Exhibit 299.

On July 29, 1998, Universal moved for leave to amend its Answer to D'Elegance's Cross-Claim and Complaint to comport with its supplemented interrogatory response, and to plead the one-year statute of limitations as a defense to D'Elegance's Miller Act claim on the bond. Anticipating the motion, D'Elegance had filed on July 27th, documents entitled, "Memorandum of Law Regarding Matters Not Pled," and "Memorandum of Law Regarding Bond Coverage for Work Performed in New Hanover County," urging the court, *inter alia,* to hold Universal to its original admission, and to preclude Universal from asserting the defense of expiration of the statute of limitations.

Jury selection for the trial in these consolidated matters was scheduled to begin in three business days, and the court concluded that the prejudice to the other parties, particularly to Malaco and S&D who were not involved in the bond dispute, would be too great to permit Universal to completely change its position at that late date. Realizing that the unfortunate situation had been created before Universal's trial counsel had been retained, and that counsel had acted as expediently possible under the circumstances, and further acknowledging that the turn of events apparently had amounted to something of a windfall for D'Elegance, the court nevertheless was compelled to deny Universal's Motion to Amend. In so doing, the court directed that Universal would be bound by its admission to D'Elegance's allegation that the bond was given "for the protection of all persons, supplying labor and materials in the prosecution of the work provided for in the Prime Contract." D'Elegance's Cross-Claim and Complaint at ¶ 7. The trial proceeded as between Universal and D'Elegance only on the issue of the amount due under the bond. Universal was not permitted to advance its theory that the bond it issued on the project covered only Delivery Order 0001 for Pender County, and that, because D'Elegance had not filed its claim within one

year of completing that project, the one-year Miller Act statute of limitations precluded its recovery on the bond.

During D'Elegance's case-in-chief, however, its witness, Alan Dodd, volunteered on cross-examination by Universal's counsel that he, on behalf of Waste Control, and Kevin McQuain, the surety agent holding Universal's power of attorney, discussed with the Corps "rolling over" the bond from one delivery order to the next, After establishing through Mr. Dodd that the Corps contract provided that "funds will be obligated on individual delivery orders," and that until the Corps issued a delivery order specifying work to be performed, Waste Control had no right to begin work in a particular area, Universal's counsel referred Dodd to back to the Corps contract:

> Q. And with regard to the performance bond, refer back to H.7 of the contract, Exhibit 43 [Corps Contract], please. Can you tell us what the contract says with regard to the amount of performance bonds which were required under this contract?
>
> A. Yes. You mean read what it says here?
>
> Q. Yes, if you would, please.
>
> A. Right underneath the performance bond, it says the payment amount of the performance bond shall be 100 percent of the original contract price if the contract price is over $25,000.

Q. Looking at Exhibit 294 [Sept. 24, 1996, Performance Bond; not introduced into evidence] can you determine what the cumulative amount of that bond is?

A. Yes, Sir,

Q. What is that?

A. $2 million.

Q. $200

A. $2 million.

Q. $2 million? Let me refer you then back again to Exhibit 43 I am sorry. Exhibit 88 [Delivery Order 0001], What is the amount of Delivery Order number 1 ?

A. It shows a total of $2,455,000.

Q. That is block 23 on Exhibit 88; is that correct?

A. Yes.

Q. Are you aware of any other bonds being provided by Waste Control with regard to this project, performance bonds?

A. Yes, sir.

Q. What were they?

A. As Waste Control Services, as we began to receive more delivery orders, I had been contacted by a surety agent referring to Waste Control's bond limitations, and each time we got a delivery order, we were obligated to provide a bond according to the contract So to make this work out for WCS, the company I was working for at the time, the underwriter and myself approached the Corps with the idea of rolling over the bond that we had in place originally to cover some of the other contract amounts on the basis that at any given time any given day during the week, we would not have more than $2 million worth of performance written on it at any one time.

Q. Did you yourself talk with anybody at Universal, about whether they agreed to do that?

A. I spoke, you know, with Kevin McQuain.

THE COURT: I am sorry. You spoke with whom?

THE WITNESS: Kevin McQuain, the bonding agent. I talked to our agent.

BY MR. JARRETT:

Q. You didn't talk to anybody at Universal?

A. No, sir. I didn't go direct.

Q. What is an agent, somebody that sells company insurance, is that correct?

A. Yes, sir.

Q. He is not employed by Universal Surety, is he?

A. No, sir. He was the immediate representative.

THE COURT: Representative of who?

THE WITNESS: Of the surety company, you know. Kevin McQuain was a bonding agent. If we had any questions about bonds or anything of that nature, that would be our representative that we would talk to.

Excerpt from Alan Dodd trial testimony transcript, at pp. 7-10.

That testimony, coming unsolicited from D'Elegance's own witness,[5] appeared to the court to be entirely consistent with [Universal's] position that the bond it issued on the project dated September 18th, supplemented September 24th, covered only Delivery Order 0001 - Pender County - rather than the entire project, as D'Elegance contends Universal also tendered, but was not permitted to introduce, as Exhibit 295, Reinsurance Agreement for Miller Act Performance Bond, executed September 24, 1996, which also supports its position.

Realizing that the record with regard to the scope of bond coverage - the central issue in the controversy between D'Elegance and Universal - now was hopelessly in conflict, the court advised counsel that in the interests of judicial economy it would permit the jury to consider the amount of liability under the bond, but that the scope of the bond's coverage would have to be subjected to further scrutiny. Both before and after the jury rendered a verdict in D'Elegance's favor, the court solicited assistance from counsel in crafting an appropriate remedy, stating that, in light of Mr. Dodd's testimony, which tended to corroborate other materials tendered by Universal, fairness and equity required some manner of evidentiary hearing on the matter. On September 1, 1998, the undersigned conducted a post-trial telephone conference with counsel for D'Elegance and Universal, at the conclusion of which the court advised counsel that, unless they were able to reach a compromise within ten days, the court would declare a mistrial.

The ten days came and went, and counsel failed to reach any agreement. Rather, Universal has renewed its Motion to Amend its Answer, and has submitted its proposed scheduling order in anticipation of the court's declaring a mistrial. D'Elegance has responded in opposition to the

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[5] In fact, by the time of trial, Alan Dodd was employed by D'Elegance.

Motion to Amend, and in opposition to the court's consideration of Universal's proposed scheduling order. D'Elegance takes the position that the issue of the bond coverage first should be considered by the court upon written memoranda and, if the court determines the documents were too ambiguous to interpret as a matter of law, a brief period of discovery should ensue after which the parties should submit additional memoranda. If the court still could not decide, then the matter would be retried to a jury. Finally, D'Elegance argues that Universal still may not amend its pleadings, based on the courts rulings just prior to the August trial.

For the reasons set forth above, the court declares a MISTRIAL in D'Elegance's Miller Act claim against Universal. That matter is SEVERED from the remainder of the claims in this consolidated lawsuit. For the reasons set forth in its Memorandum filed in support thereof, Universal's Motion to Amend its Answer to Cross-Claim and Complaint is ALLOWED. The Clerk of Court is DIRECTED to cause the Amended Answer to be filed. The court is fully aware of D'Elegance's position on the matter, but the circumstances which resulted in the denial of the motion three days before trial no longer exist.

D'Elegance and Universal may file such further amended pleadings as they deem necessary until December 10, 1998. All additional discovery shall be concluded by February 10, 1999. Discovery shall be limited to the issue whether the bonds issued with regard to contract DACW54-96-D-0049, between Waste Control Services and the United States Army Corps of Engineers, were to relate solely to the work covered under Delivery Order No. 0001, dated September 19, 1996, or were to cover all work performed under Waste Control's debris removal contract with the Corps. Any dispositive motions shall be filed on or before March 10, 1999. "The Clerk of Court is DIRECTED to

schedule trial of the matter before a jury during the court's July 12,1999, term of court in Wilmington, North Carolina.

SUMMARY

D'Elegance's Motion for Judgment as a Matter of Law is ALLOWED as to Malaco's $100,000.00 fraud damages award and $500,000.00 punitive damages award, and those awards hereby are SET ASIDE. The verdict that D'Elegance committed fraud in the inducement of its contract with Malaco, however, is undisturbed, and D'Elegance's motion with regard thereto is DENIED.

D'Elegance's Motion for Judgment as a Matter of Law is DENIED as to the $400,000.00 breach of contract award. Pre-judgment interest from December 12, 1996, through August 17, 1998, at the rate determined pursuant to 28 U.S.C. § 1961, shall apply to Malaco's $400,000.00 breach of contract award. Malaco's Motion to Treble Damages is DENIED.

D'Elegance shall pay to Malaco the sum of $126,231.00 in reasonable attorney's fees, plus the sum of $8,865.80 in expenses reasonably incurred in the prosecution of this action. The Clerk of Court is DIRECTED to prepare an order for bill of costs.

The court declares a MISTRIAL in D'Elegance's claim against Universal, and that claim is SEVERED from all other claims in this action. Universal's Motion to Amend its Answer to Cross-Claim and Complaint is ALLOWED. Any further amended pleadings must be filed on or before December 10, 1998. Any additional discovery shall be strictly limited as set forth herein, and shall be completed by February 10, 1999. Dispositive motions, if any, shall be filed on or before March 10, 1999, and the trial of this matter before a jury is rescheduled during the courts July 12, 1999, term of court in Wilmington, North Carolina.

SO ORDERED.

This the 2nd day of November, 1998.

\s\ _____
James C. Fox
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk, United States District Court Eastern District of North Carolina
By: \s\ _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
for the use and benefit of
S&D LAND CLEARING, INC., and
MIKE MITCHELL, d/b/a MALACO,
Plaintiffs,

v.

ENVIRONMENTAL CORRECTIONS
CORP., a/k/a WASTE CONTROL
SERVICES, D'ELEGANCE MANAGEMENT
LIMITED, INC. and UNIVERSAL
SURETY OF AMERICA
Defendants.

JUDGMENT IN A CIVIL CASE
CASE NO. 7:97-CV-49-42
Entered: November 03, 1998

___ Jury Verdict This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tied or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that D'Elegance's Motion for Judgment as a Matter of Law is ALLOWED as to Malaco's $100,000.00 fraud damages award and $500,000.00 punitive damages award, and those awards hereby are SET ASIDE. The verdict that D'Elegance committed fraud in the inducement of its contract with

Malaco, however, is undisturbed and D'Elegance's motion with regard thereto is DENIED.

D'Elegance's Motion for Judgment as a Matter of Law is DENIED as to the $400,000.00 breach of contract award. Pre-judgment interest from December 12, 1996, through August 17, 1998, at the rate determined pursuant to 28 U.S.C. § 1961, shall apply to Malaco's S400,000.00 breach of contract award. Malaoco's Motion to Treble Damages is DENIED.

DMeganco shall pay to Malaco the sum of *$126,231.00* in reasonable attorney's fees, plus the sum of $8,865.80 in expenses reasonably incurred in the prosecution of this action.

The court declares a MISTRIAL in D'Elegance's claim against Universal and that claim is SEVERED from all other claims in this action. Universal's Motion to Amend its Answer to Cross-Claim and Complaint is ALLOWED.

THE ABOVE JUDGMENT WAS ENTERED TODAY, November 3, 1998, AND A COPY MAILED TO:

Michael Murchison
16 N. 5th Avenue
Wilmington, NC 28401

C. Hamilton Jarett, Esq.
P.O. Box 19640
Raleigh, NC 27619

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P.O. Box 17529
Raleigh, NC 27619

Stanley L. Rodenbough, Esq.
P.O. Box 26000
Greensboro, NC 27420

November 3, 1998
Date

DAVID W. DANIEL
Clerk

Wilmington, North Carolina

\s\ _____
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: August 8, 2000
Entered: August 8, 2000

No. 98-2758
CA-97-49-7-F

UNITED STATES OF AMERICA,
for the use and benefit of S & D Land Clearing;
MIKE MITCHELL,
dba Malaco
Plaintiffs – Appellees,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED;
Defendant – Appellant,

UNIVERSAL SURETY OF AMERICA,
Defendant – Appellee,

and

ENVIRONMENTAL CORRECTIONS SERVICES,
a/k/a Waste Control Services.
Defendant.

No. 98-2852
CA-97-49-7-F

UNITED STATES OF AMERICA,
for the use and benefit of S & D Land Clearing;
MIKE MITCHELL,
dba Malaco
Plaintiffs – Appellants,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED;
Defendant – Appellee,

and

ENVIRONMENTAL CORRECTIONS SERVICES,
a/k/a Waste Control Services;
UNIVERSAL SURETY OF AMERICA,
Defendants.

No. 99-1437
CA-97-49-7-4

UNITED STATES OF AMERICA,
for the use and benefit of S & D Land Clearing;
MIKE MITCHELL,
dba Malaco
Plaintiffs – Appellees,

v.

D'ELEGANCE MANAGEMENT LIMITED,
INCORPORATED;
Defendant – Appellant,

UNIVERSAL SURETY OF AMERICA,
Defendant – Appellee,

and

ENVIRONMENTAL CORRECTIONS SERVICES,
a/k/a Waste Control Services,
Defendant.

ORDER

Appellant/cross – Appellee filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
Clerk